

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2008

THOMAS JETER v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Marshall County
No. 17426 Robert Crigler, Judge**

No. M2007-01229-CCA-R3-PC - Filed August 13, 2008

The petitioner, Thomas Jeter, pled guilty to two multi-count indictments for the possession, sale and delivery of drugs, and conspiracy to sell and deliver drugs. The petitioner filed a post-conviction petition for relief alleging the ineffective assistance of counsel. Specifically, the petitioner argued that his trial counsel had a conflict of interest which required that his convictions be set aside. After an evidentiary hearing, the post-conviction court denied the petitioner relief. On appeal, the petitioner argues that counsel's conflict of interest requires reversal of his convictions. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

L. Samuel Patterson, Jr., Columbia Tennessee, for the appellant, Thomas Jeter.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

Petitioner's trial counsel testified at the post-conviction hearing that he was hired by the petitioner before he was indicted in both cases. The petitioner informed counsel that he had already spoken with officers from the 17th Judicial Drug Task Force and admitted his guilt. Counsel stated that the petitioner was more interested in limiting the amount of time he spent in confinement and less interested in contesting the charges.

Counsel testified that he reviewed the discovery materials in the petitioner's cases, including videotape surveillance footage showing the petitioner involved in the selling of drugs. After reviewing the tapes, counsel believed that it would be difficult to explain the petitioner's actions should the case go to trial. He stated that he also evaluated the petitioner's voluntary statements to members of the drug task force to see if he might be able to file a motion to suppress. Counsel acknowledged that based on the fact that the petitioner invited the officers into his home and made uncoerced statements to them, it would be difficult to prevail on a motion to suppress. He stated that he also decided not to pursue a motion to suppress because of the petitioner's express desire to plead guilty rather than go to trial.

Counsel testified that he met with the petitioner at least four times prior to the entry of his guilty plea. Two of those four meetings were attended by the petitioner's parents. Counsel explained that the petitioner was charged in two separate indictments with the possession, sale and delivery, and conspiracy to sell and deliver Schedule II drugs. He was also charged with one count of possession of a Schedule VI drug. Counsel informed the petitioner that he could receive as little as eight years or as much as forty-five years in confinement. Counsel further explained the difference between concurrent and consecutive sentencing and how that determination was made.

Counsel testified that he met with the petitioner to determine what mitigation factors might apply and to determine whether any character witnesses were available. He stated that he believed that the petitioner was "a little slow" and had a difficult time understanding certain concepts. For that reason, counsel asked the petitioner's parents if the petitioner had attended any type of special education or remedial classes. According to counsel, the petitioner's parents told him that the petitioner had received special education instruction before discontinuing his education in the ninth grade. Neither the petitioner nor his parents were able to provide the names of any character witnesses, preachers, teachers or employers who could testify on his behalf. Counsel also stated that the petitioner was unemployed.

Counsel testified that based on his evaluation of the petitioner, he filed a motion to consider mitigation factors. Included among the mitigation factors counsel submitted to the court were the following: (1) the petitioner's conduct neither caused nor threatened serious bodily injury; (2) that the petitioner acted under strong provocation to be accepted; (3) the petitioner played a minor role in the situation of his offenses; (4) that the petitioner, due to his youth, demonstrated a lack of substantial judgment in committing the offense; and (5) the petitioner suffered from a mental condition that significantly reduced his culpability.

Counsel testified that in addition to his private criminal defense practice, he prosecuted city ordinance violations as the city attorney for the city of Lewisburg. Counsel stated that under statutory authority, a number of offenses such as assaults and DUIs, had been incorporated into the city ordinances and could therefore be prosecuted in Lewisburg city court as violations of city ordinances. Counsel also stated that he did not represent city officials or city police officers. He noted that he did not have the power to prosecute felonies or other misdemeanor offenses derived from state statutory authority which were not incorporated into the Lewisburg city ordinances. He

asserted that he had never been employed by the Office of the District Attorney or sworn in as an Assistant District Attorney at any time. Counsel admitted that he had prosecuted the petitioner for violations of city ordinances in the past. He stated that the petitioner's last city ordinance violation had been resolved approximately a year before the petitioner hired counsel to represent him.

On cross-examination, counsel testified that before accepting the position as city attorney in 2002, he consulted Lance Bracey, Chief Disciplinary Counsel for the Tennessee Board of Professional Responsibility, who orally instructed him that so long as no city police officer or city employee served as the affiant for any warrants or indictments against his client, he was free to engage in a dual practice as Lewisburg city attorney and as a private criminal defense attorney. Counsel testified at the request of the district attorney, he memorialized a conversation between his paralegal and Mr. Bracey in a written letter immediately prior to the hearing on April 13, 2007. The letter confirmed his ability to act in both capacities, "so long as the case did not originate from a City of Lewisburg police investigation, and the individuals were charged solely with state law violations."

On further cross-examination, counsel testified that the affiant on the warrants against the petitioner in both indicted cases was Tim Miller, an agent with the 17th Judicial Drug Task Force. Counsel confirmed that Mr. Miller was not a member of the Lewisburg City Police Department. Counsel met with Mr. Miller to review the cases and view the video and audio tapes featuring the petitioner. Subsequently, the petitioner confirmed what was on the video and audio tapes to counsel. Counsel also spoke with two Lewisburg city detectives to determine their involvement in the case, and to determine if their involvement would disqualify him from representing the petitioner. After meeting with the detectives, he concluded he would be able to represent the petitioner.

Counsel testified that the state made a written offer of two consecutive nine-year terms for a total of eighteen years as a standard offender at thirty percent. Counsel stated that he was unable to persuade the state to run the sentences concurrently for a total of nine years. Counsel estimated that prior to the plea, he spent somewhere between eight and twelve hours with the petitioner. Counsel informed the petitioner that he could accept the eighteen year offer from the state, or make an "open" plea. He informed the petitioner that in an open plea, the judge would determine the petitioner's sentence length. Counsel also told the petitioner that in an open plea scenario, he could receive up to three consecutive sentences totaling more than eighteen years, or his total sentence might be limited to nine years if the trial court judge decided to impose concurrent sentences. Counsel explained to the petitioner that it was his belief that based on the petitioner's cooperation with police officials and his willingness to plead, there was an unwritten, unspoken rule that a decision to plead guilty rather than go to trial would be viewed favorably by the court. Counsel testified that after apprising the petitioner of his options, he left the decision up to the petitioner and his parents. The petitioner entered into a negotiated guilty plea to all but one of the charged counts against him which was nolle prosequed. After pleading guilty, the trial court imposed consecutive and concurrent sentences for an effective total of eighteen years in confinement.

Counsel testified that he believed the petitioner's case was harmed by the petitioner's lack of employment. At sentencing, the trial court enhanced the petitioner's sentence on the basis that

the petitioner was unemployed and selling drugs for a living. Counsel testified that after his sentence was announced, the petitioner did not complain about the terms of his sentence. According to counsel, the petitioner's only question was whether he would be immediately taken into custody.

On re-direct examination, counsel stated that Lewisburg Police Officers had a policy of cooperating with the judicial drug task force. Upon review of the arrest report, counsel stated that it appeared that Lewisburg Police Officers assisted the drug task force members during the petitioner's arrest in a back-up capacity.

The petitioner testified that he was currently incarcerated through the Tennessee Department of Correction. The petitioner admitted that he hired counsel to represent him. He stated that he knew counsel was the city attorney because counsel had prosecuted him for several misdemeanors in city court. He stated that he first met with counsel the day before he was indicted, and then met with him again the day after his indictments were handed down. He stated that in preparation for his plea, he and counsel discussed a co-defendant's statement implicating him, as well as the video and audio surveillance which showed him participating in drug sales to undercover drug task force officers. The petitioner stated that he had never been slow in school and did not consider himself a slow learner. He also stated that he did not discuss any kind of conflict of interest with counsel.

On cross-examination, the petitioner testified that he was referred to counsel by his father. He stated that the fact that counsel prosecuted cases for the city did not factor into his decision to hire him. The petitioner recalled that counsel reviewed the mitigating factors that he filed on his behalf with him, and discussed potential witnesses that might be called to speak about his character. The petitioner could not recall whether counsel made any promises to him, whether he promised him he would get less than eighteen years, or whether counsel discussed his guilty plea with him prior to entering it with the court.

At the conclusion of the evidentiary hearing, the post-conviction court denied the petitioner post-conviction relief. The court concluded that the petitioner knowingly, intelligently and voluntarily pled guilty to the charged offenses. In the court's view, the petitioner was aware that he could get less, the same, or more than the state's offer. Furthermore, the court found that the record demonstrated that the petitioner had a history of criminal convictions for misdemeanor offenses. The post-conviction court also found that based on the petitioner's gang affiliations, lack of employment and other proof, the petitioner was ill-suited for alternative sentencing. The court also concluded that there was no conflict between counsel's practice as a city attorney and his representation of the petitioner in the criminal charges against him.

II. ANALYSIS

On appeal, the petitioner argues that he received the ineffective assistance of counsel. Specifically, the petitioner argues that his trial counsel was ineffective due to a conflict of interest and therefore, his convictions should be reversed.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.*; *see also Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently, and, but for counsel's errors, the petitioner would not have pled guilty but, instead, would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

The first issue to be resolved is whether trial counsel did in fact have a conflict of interest which prevented him from representing the petitioner. "In determining whether to disqualify an attorney in a criminal case, the trial court must first determine whether the party questioning the propriety of the representation met its burden of showing that there is an actual conflict of interest." *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003) (internal citations omitted). "The mere fact that counsel might have a potential conflict of interest in representing multiple clients does not authorize a presumption of ineffective assistance of counsel." *Netters v. State*, 957 S.W.2d 844, 847 (Tenn. Crim. App. 1997) (internal citations omitted). "[U]ntil a [petitioner] shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

Upon review of the record, we conclude that no actual conflict of interest existed which would have precluded trial counsel from representing the petitioner. The record reflects that prior

to accepting the position as Lewisburg city attorney in 2002, counsel elicited an opinion from the Tennessee Board of Professional Responsibility as to whether he would be able to maintain a private criminal defense practice while simultaneously representing the city. At that time, counsel was orally instructed by Lance Bracey, Chief Disciplinary Counsel for the Tennessee Board of Professional Responsibility, that so long as no city police officer or city employee served as the affiant for any warrants or indictments against his client, he could engage in the dual practice he had described. The letter memorializing the subsequent conversation between his paralegal and Mr. Bracey confirmed counsel's ability to act in both capacities, "so long as the case did not originate from a City of Lewisburg police investigation, and the individuals were charged solely with state law violations." In the instant case, the investigation resulting in the petitioner's arrest and subsequent indictment originated with the 17th Judicial Drug Task Force, not the Lewisburg City Police Department. Additionally, the petitioner was charged in all counts with felonies under state law and counsel had no authority to prosecute as the Lewisburg city attorney. Furthermore, the affiant for the warrant cited in the indictments against the petitioner was a member of the 17th Judicial Drug Task Force, not a member of the Lewisburg Police Department.

In *State v. White*, the supreme court concluded that an attorney whose dual roles as Assistant District Attorney and as a criminal defense attorney "were inherently antagonistic and thus, created an actual conflict of interest." *White*, 114 S.W.3d at 478.¹ In the instant case, however, counsel's duties as a city attorney prosecuting violations of Lewisburg city ordinances did not conflict with his ability to represent his criminally accused clients because as city attorney, he had no authority to prosecute felonies or other crimes charged under state statute. Unlike the attorney in *White*, petitioner's counsel never served as an Assistant District Attorney and was not affiliated with the District Attorney General's Office. We conclude that for those reasons, no conflict of interest was created which would have obligated trial counsel to either disclose his dual roles, or which would have required him to obtain a signed, written waiver from the petitioner before representing him.

¹ Formal Ethics Opinion 2002-F-146 was issued to address the issue raised in *State v. White*, 114 S.W.3d 469, and incorporated by reference in the instant case at the post-conviction hearing in the court's discussion of its dismissal of the petitioner's post-conviction petition. It states in relevant part:

In Informal Opinion 1285 (1974), the ABA opined that municipal attorneys prosecuting municipal ordinance violations (who handled no state prosecutions under state statutes in the particular county), could represent criminal defendants in the county's criminal courts who were charged solely with state law violations. . . . Even though the ABA held in Informal Opinion 1285 that the municipal prosecutors were not *per se* disqualified from defending criminal defendants charged with state violations, the approval given was also carefully limited to circumstances in which no municipal police officers from the municipality were involved.

....

The limited authority granted municipal attorneys (not state prosecutors) to represent criminal defendants within the same county appears to be carefully circumscribed to circumstances where the prosecution is not initiated by that municipality's Police Department, and circumstances where a county prosecuting attorney seeks only to defend municipal cases brought only by municipal police officers.

We also note that petitioner argues that a conflict of interest existed because of the involvement of Lewisburg police officers in the investigation leading to the petitioner's arrest. We conclude, however, that the petitioner failed to offer any evidence that the Lewisburg city police officers were involved in the investigation in any capacity other than as a back-up to the operation of the 17th Judicial Drug Task Force. Furthermore, no Lewisburg city police officers were listed on either the affidavit for the warrants or in the indictments against the petitioner. Therefore, we conclude that no conflict of interest was created for counsel by the participation of the Lewisburg police officers in the underlying drug investigation.

Like the post-conviction court, we conclude there is no merit to the petitioner's allegation that he received the ineffective assistance of counsel. The record in this case fully supports the post-conviction court's findings that counsel provided effective representation. Counsel's testimony, which was specifically accredited by the post-conviction court, established that he spoke with the petitioner on a number of different occasions, discussed the case with the petitioner, thoroughly investigated the facts of the case, negotiated a favorable plea agreement, and explained to the petitioner the nature and consequences of the negotiated guilty pleas. Counsel testified that the cases against the petitioner were very strong, and he did not believe he would succeed on a motion to suppress. There is no evidence that counsel was deficient in his representation, or that the petitioner would not have pled guilty but for the alleged deficiencies of counsel. The record does not preponderate against the post-conviction court's findings, and therefore, the petitioner is not entitled to post-conviction relief.

CONCLUSION

Following our review, we conclude that the petitioner has not met his burden of proving that trial counsel was ineffective in his representation or that counsel had a conflict of interest which prevented him from representing the petitioner. Accordingly, we affirm the denial of the petition for post-conviction relief.

J.C. McLIN, JUDGE